

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDY HERKALO :
 :
 V. : 94-CV-7660
 :
 NATIONAL LIBERTY CORP. :
 and MICHAEL BOYLE :

MEMORANDUM

Broderick, J.

July 21, 1997

Presently before the court are the post-trial motions of Defendant National Liberty Corporation for judgment as a matter of law, or in the alternative for a new trial, or in the alternative for a remittitur of the jury's damages award. The Plaintiff Judy Herkalo has filed timely objections to the Defendant's post-trial motions. For the reasons stated hereinafter, National Liberty's post-trial motions will be denied.

The Plaintiff commenced this sex discrimination action against her former employer National Liberty Corporation and her former supervisor, Michael Boyle, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and the Pennsylvania Human Relations Act (PHRA), as amended, 43 P.C.S.A. § 951 et seq. The Plaintiff asserted three claims: (1) that she was subjected to a hostile work environment because she is a woman, (2) that she was retaliated against for having filed a sex discrimination complaint against her supervisor Michael Boyle, and (3) that she was constructively discharged.

Trial was bifurcated. The liability portion of the trial

commenced on January 21, 1997. At the close of the Plaintiff's case, National Liberty and Mr. Boyle moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The court denied the Defendants' motions without prejudice the Defendants renewing their motion at the close of the evidence.

At the close of the evidence, the Defendants renewed their Rule 50 motions for judgment as a matter of law. The court denied defendant National Liberty's motion for judgment as a matter of law. The court granted defendant Boyle's motion for judgment as a matter of law as to the Plaintiff's Title VII claim and denied his motion as to the Plaintiff's PHRA claim. Pursuant to the en banc decision of the Third Circuit in Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996), cert. denied, 1997 WL 49784 (1997), Title VII does not provide for individual employee liability. However, pursuant to the Third Circuit's decision in Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir. 1996), the PHRA does provide for individual employee liability under its aiding and abetting provision, § 955(e).

The jury returned its liability verdict on January 30, 1997, answering the court's Jury Verdict Sheet as follows:

1. Do you find that the Plaintiff Judy Herkalo has proved by a preponderance of the evidence that during her employment with Defendant National Liberty, she was subjected to a hostile work environment because of her gender and that Defendant National Liberty knew or should have known that she was being subjected to a hostile work environment because of her gender and failed to take prompt remedial

action to end the hostile work environment?

YES X NO

2. Do you find that the Plaintiff Judy Herkalo has proved by a preponderance of the evidence that Defendant National Liberty retaliated against her for having made a sex discrimination complaint?

YES X NO

3. Has the Plaintiff Judy Herkalo proved by a preponderance of the evidence that she was constructively discharged from her employment at National Liberty in that the conditions of her employment were so intolerable that a reasonable woman subjected to such working conditions would be forced to leave her employment with the Company?

YES X NO

4. Has the Plaintiff Judy Herkalo proved by a preponderance of the evidence that Defendant Michael Boyle aided and abetted Defendant National Liberty in failing to take prompt remedial action to end the hostile work environment or aided and abetted Defendant National Liberty in retaliating against the Plaintiff for having made a sex discrimination complaint?

YES NO X

Following the damages portion of the trial, the jury returned on January 31, 1997 with its verdict answering the court's Jury Verdict Sheet as follows:

1. Back Pay Loss from July 23, 1993 to January 31, 1997 in the amount of: \$ 35,000
2. Compensatory Damages, including the present value of Front Pay Loss from February 1, 1997 for the period of Plaintiff's work life expectancy and damages for pain and suffering during 1992 and 1993 in the amount of: \$ 265,000
3. Total amount of Damages awarded to the Plaintiff Judy Herkalo against Defendant National Liberty [sum total of item numbers 1 and 2] in the

amount of:

\$ 300,000

On February 19, 1997, National Liberty filed its post-trial motions seeking (1) judgment as matter of law as to Plaintiff's hostile work environment claim on the ground that the Plaintiff failed to present sufficient evidence to support the jury's finding that the Plaintiff was subjected to a hostile work environment because of her gender and that National Liberty knew or should have known that she was being subjected to a hostile work environment because of her gender and failed to take prompt remedial action to end the hostile work environment, (2) judgment as a matter of law as to Plaintiff's retaliation claim on the ground that the Plaintiff failed to present sufficient evidence to support the jury's finding that National Liberty retaliated against her for having made a sex discrimination complaint, and (3) judgment as a matter of law as to Plaintiff's constructive discharge claim on the ground that the Plaintiff failed to present sufficient evidence to support the jury's finding that the Plaintiff was constructively discharged from her employment at National Liberty in that the conditions of her employment were so intolerable that a reasonable woman subjected to such working conditions would be forced to leave her employment.

In the alternative, National Liberty seeks a new trial as to each of the Plaintiff's claims -- hostile work environment, retaliation, and constructive discharge -- on the ground that the jury's verdict as to each claim is contrary to the weight of the

evidence.

National Liberty also seeks in the alternative a remittitur of the jury's damages award on the ground that the damages award is speculative, excessive, and not supported by the evidence.

Summary of the Evidence Presented at Trial

The evidence presented over the course of the nine day trial may be summarized as follows: The Plaintiff began her employment with National Liberty in 1979 working as a bookkeeper in the Company's Accounting Department. She received several promotions during the course of her employment and eventually was promoted to Manager of Marketing Support in August 1990.

In March 1992, Michael Boyle became Director of Management Reporting, thereby becoming the Plaintiff's immediate supervisor. The Plaintiff testified that as her supervisor, Mr. Boyle regarded her opinions and skills less favorably than he regarded the opinions and skills of male workers. For example, the Plaintiff testified that Mr. Boyle excluded her from certain departmental projects and that he reassigned her responsibilities for managing the department's vacation calendar to a male worker.

The Plaintiff testified that Mr. Boyle assigned her jobs which were not sufficiently challenging for someone of her "skills and talent." Mr. Boyle routinely responded to the Plaintiff's requests for more challenging work assignments by stating that her personal career growth and development were of no concern to his managerial decisions. The Plaintiff also

testified that Mr. Boyle frequently praised and complimented male workers for their work-product, but to her knowledge Mr. Boyle never praised or complimented female workers for their work-product.

The Plaintiff testified that Mr. Boyle frequently embarrassed her by raising his voice at her and yelling at her in the presence of other workers. He also raised his voice and yelled at other women in the department. To the best of the Plaintiff's knowledge, however, Mr. Boyle never raised his voice or yelled at males workers.

According to the Plaintiff's testimony, Mr. Boyle made several offensive comments which the Plaintiff considered to be indicative of his animosity towards women. On one particular occasion, the Plaintiff was present when Mr. Boyle stated to a female worker that "she [the worker] was probably going to get pregnant, stay home, and not go back to work." Mr. Boyle's statement upset the female worker who turned to the Plaintiff and said: "Did you hear what he said to me, did you hear what he said to me?"

Moreover, there was testimony presented by the Plaintiff that Mr. Boyle had made a comment concerning the results of a "Myers-Briggs" personality test which was administered by the Company during a management training course. The Plaintiff tested "NF" -- which represented a "feeling-type" of personality. Mr. Boyle tested "NT" -- which represented a "thinking-type" of personality. Mr. Boyle learned that the Plaintiff tested NF and

he stated to her that NF types "do not go far in this organization." The Plaintiff testified that she interrupted Mr. Boyle's comment as a sexist comment because during the training class they were informed that women generally test NF while men generally tested NT.

On another occasion, the Plaintiff gave Mr. Boyle a report which contained a photograph of a woman. Mr. Boyle pointed to the photograph and stated: "Is she a bottled blond or a natural blond?" Mr. Boyle also made a comment in the Plaintiff's presence concerning a male worker named Chip Beaver. Mr. Boyle stated to the Plaintiff: "What a last name, Beaver. Get it, Beaver?"

Moreover, a female staff analyst whom the Plaintiff supervised complained to the Plaintiff about an offensive comment Mr. Boyle made to her at a lunch meeting in October 1992. Mr. Boyle asked the female staff analyst whom he supervised when she was planning to start a family. She informed him that it was none of his business. Mr. Boyle retorted that "he was making it his business." The female staff analysis immediately reported Mr. Boyle's comment to the Plaintiff.

Soon after learning of Mr. Boyle's lunch meeting comment, the Plaintiff resolved to file a sex discrimination complaint against him with the Company's Equal Opportunity Review Board (EORB). The Plaintiff was informed by the EORB that her identity as a complainant would be confidential. The Plaintiff spoke with the co-chairperson of the EORB concerning her allegations that

Mr. Boyle was discriminating against her and other women. The EORB conducted a series of fact-finding interviews of employees of the Company who worked with Mr. Boyle. After conducting the interviews, the EORB sent a memorandum dated November 16, 1992 to Richard Smith, the Chief Financial Officer of the Company. Mr. Smith was Mr. Boyle's immediate supervisor. The memorandum informed Mr. Smith that a female subordinate under Mr. Boyle's supervision had filed a sex discrimination complaint against him. The memorandum also informed Mr. Smith that the EORB had interviewed several employees concerning Mr. Boyle's treatment of women at the Company. Attached to the memorandum was a summary of the interview responses. The memorandum requested Mr. Smith to "respond back to the EORB within one week with his recommendation/action plan to rectify this complaint." Testimony was presented at trial by EORB members that Mr. Smith failed to submit a written response to the EORB's memorandum.

At trial, Mr. Smith testified that although he did not submit a written response to the EORB memorandum, he did discuss with a member of the Human Resources Department a plan to send Mr. Boyle to management training classes. The purpose of sending Mr. Boyle to the training classes was to improve his managerial skills. Mr. Smith testified, however, that other than requiring Mr. Smith to attend managerial training classes, he never disciplined Mr. Boyle for any of the allegations in the Plaintiff's complaint.

Mr. Boyle testified at trial that in December of 1992, he

and Mr. Smith met to discuss the fact that a female subordinate had filed a sex discrimination complaint. At that meeting, Mr. Smith informed Mr. Boyle that he was required to participate in several in-house seminars and one outside training seminar for the purpose of improving his managerial skills. Mr. Boyle testified that he attended approximately 100 in-house training hours and approximately 60 external training hours.

Despite being told that her identity as a complainant would be held confidential, the Plaintiff testified that Mr. Boyle somehow learned that she was the woman who had filed the complaint against him. According to the Plaintiff, after Mr. Boyle learned that she filed the complaint, his discriminatory treatment of her "intensified." For example, the Plaintiff testified that Mr. Boyle yelled at her more often. He also prohibited her from holding staff meetings with the Marketing Support Group.

Moreover, the Plaintiff testified that in January 1993 she was working on a "year-end close" and that Mr. Boyle falsely accused her of not working diligently on her assignments. Mr. Boyle sent a male worker to the Plaintiff's work-station to take over the Plaintiff's responsibilities. The Plaintiff asked Mr. Boyle to reassign the male worker so that she could return to her work-station. Mr. Boyle denied the Plaintiff's request, and further accused her of being "unteam-like." The weekend following this incident, Mr. Boyle left the Plaintiff a telephone voice-message in which he accused her of being disrespectful

towards him and in which he also stated that her behavior was unprofessional.

The Plaintiff immediately contacted the co-chairperson of the EORB and told her about Mr. Boyle's voice-message. A meeting was set up between the Plaintiff and Mr. Boyle for Monday morning. Mr. Boyle, however, cancelled the meeting.

In February 1993, the Plaintiff was told by the EORB that it was closing its investigation. She was told that the EORB had finished its investigation and had concluded that her complaints were the result of a "personality conflict and a management style difference" between herself and Mr. Boyle. According to the Plaintiff's testimony, the EORB blamed her for the problems with Mr. Boyle and informed her that she "was the difficult employee." The EORB also recommended that she consider requesting a transfer out of the Accounting Department so that she would no longer be under the supervision of Mr. Boyle.

Two days after the EORB meeting, the Plaintiff contacted an attorney, who sent a letter on February 8, 1993 to the Company's Vice-President of Human Relations. In the letter, the attorney requested a meeting for the purpose of discussing the Plaintiff's claim that she was being discriminated against because she is a woman.

Several weeks later, the Company informed the attorney that it considered the Plaintiff to be a valuable employee and that it did not wish to lose her services as an employee. The Company offered to transfer the Plaintiff out of the Accounting

Department and into the Treasury Unit, where she would be under the direction of a new supervisor named John Mazzucca. Based on the Company's representations to her attorney, the Plaintiff understood that her new position in the Treasury Unit would consist of work on "high level special projects and acquisitions and mergers."

On March 12, 1993, the Plaintiff was given her 1992 performance review by Mr. Smith, the Company's CFO. The Plaintiff's 1992 performance review was based on the work she had performed in 1992 under the supervision of Mr. Boyle. The Plaintiff's performance rating for 1992 was "threshold," which the Plaintiff understood to represent a rating which was "significantly below standard."

Soon thereafter, the Plaintiff accepted the Company's offer to transfer her to the Treasury Unit. She began her new position in the Treasury Unit on March 15, 1993. On her first day in the new department, the Plaintiff met with her new supervisor, Mr. Mazzucca, who provided her four work assignments. The Plaintiff testified that none of her new job assignments involved work on acquisitions and mergers or work which she considered to involve high-level projects, as she was promised by the Company. Moreover, the Plaintiff's new position had no official title or job description. The Plaintiff testified that she was assigned a smaller cubicle than the other managers at her job level and that her cubicle was isolated from the other workers in the department in that it was surrounded by office equipment and empty cubicles.

Furthermore, the Plaintiff was not provided use of her own computer. When she asked Mr. Mazzucca for a computer for her cubicle, he replied that he might find one for her if she caught him on a "good day" or in a "good mood."

The Plaintiff then asked Mr. Boyle if she could take the computer she used when she worked in the Accounting Department to her new position in the Treasury Unit. Mr. Boyle denied the Plaintiff's request. The Plaintiff testified that Mr. Boyle had previously permitted a male employee to take his computer out of the Accounting Department after being transferred to another department.

The Plaintiff testified that shortly after starting her new position in the Treasury Unit, Mr. Boyle instructed two of the Plaintiff's co-workers that it was in their best interests not to speak to the Plaintiff. The Plaintiff believed that Mr. Boyle was attempting to ostracize her from the other workers. When the Plaintiff complained to Mr. Mazzucca about Mr. Boyle's comments to her co-workers, Mr. Mazzucca responded: "Find a new circle of friends." The Plaintiff testified that after her treatment by Mr. Boyle and the Company, "My good reputation was mud, I had no job, no friends."

That evening, the Plaintiff went home upset and crying. She contacted a Company counselor whom she had been meeting with since early March of 1993. As a result of her conversation with the counselor, the Plaintiff sought the treatment and advice of a physician. As a result of her consultations with the physician,

the Plaintiff notified the Company on March 26, 1993 that she was taking a medical leave of absence.

On July 17, 1993, the Plaintiff sent the Company her letter of resignation, which became effective on July 23, 1993.

Defendant National Liberty's motion for judgment as a matter of law, or in the alternative for a new trial, or in the alternative for a remittitur of the damages award

In reviewing a motion for judgment as a matter law pursuant to Rule 50, the court must determine whether there is sufficient evidence upon which a reasonable jury could properly have reached its verdict. "The question is not whether there is literally no evidence supporting the unsuccessful party, but whether there is evidence upon which a reasonable jury could properly have found its verdict." Gomez v. Allegheny Health Services, Inc., 71 F.3d 1079, 1083 (3d Cir. 1995), cert. denied, 116 S.Ct. 2524 (1996). In making this determination, the court must review the record in the light most favorable to the non-moving party.

Where, as here, a party makes an alternative motion for a new trial, Rule 59 permits the district court to "grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence." American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 948 (3d Cir.), cert. denied, 469 U.S. 854 (1984). When determining a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence, "[t]he judge is not required to take that view of the evidence most favorable to the verdict-winner [and] .

. . the judge is free to weigh the evidence for himself." 11
Wright, Miller & Kane, Federal Practice & Procedure §2806 (1995).

The court has carefully reviewed the evidence in this case in accordance with the aforementioned legal standards, and for the reasons stated hereinafter Defendant National Liberty's post-trial motions for judgment as a matter of law, or in the alternative for a new trial, will be denied.

1. The jury's verdict finding that the Plaintiff was subjected to a hostile work environment

National Liberty contends that it is entitled to judgment as a matter of law or in the alternative to a new trial as to Plaintiff's hostile work environment claim. As to this claim, in answering question number 1 on the Jury Verdict Sheet "YES," the jury found by a preponderance of the evidence that during the Plaintiff's employment with National Liberty she was subjected to a hostile work environment because of her gender and that National Liberty knew or should have known that she was being subjected to a hostile work environment because of her gender and failed to take prompt remedial action to end the hostile work environment.

In connection with the hostile work environment claim, the court instructed the jury as follows:

In order to prove her sex discrimination claim of a hostile work environment against her former employer, Defendant National Liberty, the Plaintiff must prove the following five elements by a preponderance of the evidence: (1) that she was subjected to intentional discrimination because she is a woman, (2) that the intentional gender discrimination she suffered was pervasive and regular, (3) that the

intentional gender discrimination she suffered detrimentally affected her, (4) that the intentional gender discrimination she suffered would detrimentally affect a reasonable woman in the Plaintiff's position, and (5) that the Defendant National Liberty knew or should have known that the Plaintiff was being subjected to intentional discrimination because she is a woman and failed to take prompt remedial action to end the gender discrimination.

See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996).

As the court's summary of the evidence demonstrates, the Plaintiff presented more than sufficient evidence to prove by a preponderance of the evidence that Mr. Boyle intentionally discriminated against her because she is a woman. The Plaintiff testified that Mr. Boyle yelled and raised his voice at her, but did not yell and raise his voice at male workers in the department. There was testimony presented that Mr. Boyle made several offensive comments to the Plaintiff, as well as to other female workers. Moreover, the Plaintiff testified that Mr. Boyle refused her permission to take her computer from the Accounting Department to her new position in the Treasury Unit, but that he had permitted a male employee to take his computer from the Accounting Department to his new position.

Moreover, the Plaintiff produced more than sufficient evidence to show by a preponderance of the evidence that Mr. Boyle's gender discrimination of the Plaintiff was pervasive and regular. The Plaintiff testified that Mr. Boyle's discriminatory treatment of her started in March 1992 and continued through the time of her transfer to the Treasury Unit in March 1993.

Evidence was presented as to several offensive comments Mr. Boyle made to the Plaintiff and other woman throughout the course of the year. Incidents of gender discrimination that "occur either in concert or with regularity" qualify as pervasive and regular gender discrimination. Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) (citation omitted).

Furthermore, the Plaintiff provided more than sufficient evidence to show by a preponderance of the evidence that Mr. Boyle's discriminatory treatment detrimentally affected her and that his discriminatory treatment would detrimentally affect a reasonable woman in the Plaintiff's position. The Plaintiff testified that as a result of Mr. Boyle's discriminatory treatment of her, she was forced to seek counseling and medical attention. She testified that on one particular occasion in March of 1993 she returned home upset and crying after learning that Mr. Boyle had told two of her co-workers that it was in their best interests not to speak with her.

The jury determined that the Plaintiff proved by a preponderance of the evidence that National Liberty knew that she was being intentionally discriminated against because she is a woman and failed to take prompt remedial action to end the gender discrimination. As demonstrated by the court's summary of the evidence, the Plaintiff produced more than sufficient evidence from which a reasonable jury could have reached its conclusion that National Liberty knew that she was being intentionally discriminated against because she is a woman and failed to take

prompt remedial action to end the gender discrimination.

Evidence was presented that Mr. Boyle's immediate supervisor, the Company's Chief Financial Officer, failed to submit a written response to the EORB's memorandum of November 16, 1992, which informed Mr. Smith that a female working under the supervision of Mr. Boyle had filed a complaint of sex discrimination against Mr. Boyle. Moreover, the Plaintiff contended that the managerial training programs which Mr. Boyle was required to complete failed to end Mr. Boyle's discriminatory treatment of the Plaintiff. The Plaintiff testified that after she filed the EORB complaint against Mr. Boyle, his discriminatory treatment of her "intensified."

The court instructed the jury that an employer bears the burden of taking measures to prevent an atmosphere of gender discrimination from pervading the workplace and that prompt and effective action taken by an employer to address an employee's complaint of gender discrimination relieves the employer of liability. See Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997); Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994). As heretofore pointed out, the Plaintiff presented more than sufficient evidence to show by a preponderance of the evidence that National Liberty failed to take prompt and effective remedial action to end Mr. Boyle's discriminatory treatment of the Plaintiff.

Accordingly, the court finds that the Plaintiff produced more than sufficient evidence from which a reasonable jury could

properly have found by a preponderance of the evidence that the Plaintiff was subjected to a hostile work environment and that National Liberty failed to take prompt remedial action to end the hostile work environment. In addition, the court finds that the jury's verdict finding National Liberty liable for subjecting the Plaintiff to a hostile work environment is not contrary to the weight of the evidence.

2. The jury's verdict finding that National Liberty retaliated against the Plaintiff for having filed a sex discrimination complaint

National Liberty contends that it is entitled to judgment as a matter of law, or in the alternative to a new trial, as to Plaintiff's retaliation claim. As to this claim, in answering question number 2 on the Jury Verdict Sheet "YES," the jury found by a preponderance of the evidence that National Liberty retaliated against the Plaintiff for having filed a sex discrimination complaint to the Company's EORB.

The court instructed the jury that Title VII and the Pennsylvania Human Relations Act prohibit an employer from retaliating against an employee because that employee makes a complaint of sex discrimination. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

As the court's summary of the evidence demonstrates, the Plaintiff produced more than sufficient evidence from which a reasonable jury could properly have found by a preponderance of the evidence that National Liberty retaliated against the

Plaintiff for filing her sex discrimination complaint against Mr. Boyle. Evidence was presented that upon accepting the Company's transfer offer to the Treasury Unit, the Company assigned the Plaintiff inadequate work projects which did not involve work on high-level projects or work on acquisitions and mergers, as she was promised by the Company. Moreover, the Plaintiff testified that she was denied use of a personal computer in her cubicle and that she was assigned a small cubicle, which was isolated from the other workers.

It was for the jury to determine whether these adverse working conditions of the Plaintiff's new position in the Treasury Unit were imposed as retaliation for her having filed a sex discrimination complaint. In answering question number 2 of the Jury Verdict Sheet "YES," the jury found that the Plaintiff had proved by a preponderance of the evidence that these adverse working conditions were imposed by the Company in retaliation for the Plaintiff having filed a sex discrimination complaint against Mr. Boyle.

Accordingly, the court finds that the Plaintiff produced more than sufficient evidence from which a reasonable jury could properly have found that the Plaintiff proved by a preponderance of the evidence that National Liberty retaliated against her for having filed a sex discrimination complaint. In addition, the court finds that the jury's verdict finding National Liberty retaliated against the Plaintiff is not contrary to the weight of the evidence.

3. The jury's verdict finding that the Plaintiff was constructively discharged

National Liberty further contends that it is entitled to judgment as a matter of law, or in the alternative to a new trial, as to Plaintiff's claim of constructive discharge. As to this claim, in answering question number 3 on the Jury Verdict Sheet "YES," the jury found by a preponderance of the evidence that the Plaintiff was constructively discharged from her employment at National Liberty in that the conditions of her employment were so intolerable that a reasonable woman subjected to such working conditions would be forced to leave her employment.

The court instructed the jury that in order to find that the Plaintiff was constructively discharged from her employment with National Liberty, the Plaintiff must prove by a preponderance of the evidence that a reasonable woman subjected to the same working conditions resulting from a hostile work environment and the Company's acts of retaliation would be forced to leave her employment, and that National Liberty knew or should have known of the intolerable working conditions and failed to take prompt remedial action to end the intolerable working conditions. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996).

As the court's summary of the evidence demonstrates, the Plaintiff produced more than sufficient evidence from which a reasonable jury could properly have found that the Plaintiff

proved by a preponderance of the evidence that she was constructively discharged. In addition, the court finds that the jury's verdict finding that the Plaintiff was constructively discharged is not contrary to the weight of the evidence.

4. The jury's damages award

National Liberty contends in its post-trial motions that it is entitled to judgment as a matter of law as to the Jury's damages award for back pay loss and front pay loss on the ground that the Plaintiff failed to mitigate her damages. As heretofore pointed out, the jury awarded the Plaintiff damages of \$35,000 for back pay loss and \$265,000 for compensatory damages (front pay loss and pain and suffering damages). The Plaintiff's total award of damages was \$300,000.

In connection with mitigation of damages, the court instructed the jury as follows:

I must also instruct you that under the law, the Plaintiff has a duty to "mitigate" her damages. This means that she is not entitled to any damages which you, the Jury, find the Plaintiff could reasonably have avoided. As to the issue of mitigating damages, it is the Defendant National Liberty who bears the burden of proving by a preponderance of the evidence that the Plaintiff failed to mitigate her damages.

. . . .

[T]he Defendant National Liberty bears the burden of proving by a preponderance of the evidence that Plaintiff did not mitigate her damages by showing that substantial equivalent employment was available and that the Plaintiff failed to exercise reasonable diligence to obtain that employment. Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensations, job responsibilities, and status as did the position the Plaintiff held while working for Defendant

National Liberty.

See Booker v. Taylor Milk Co., Inc., 64 F.3d 860 (3d Cir. 1995).

During the damages portion of the trial, the Plaintiff presented evidence showing her efforts to secure other employment following her medical leave of absence from National Liberty in March 1993. She testified that she regularly searched the help-wanted advertisements in newspapers for a job of comparable skill-level and salary to that which she worked at National Liberty. Eventually in June 1993, the Plaintiff accepted a part-time position as a bookkeeper for a company named Rotary Lift/Parker Associates Incorporated. The Plaintiff began her new job at Rotary Lift/Parker on July 23, 1993 and worked approximately twenty hours per week. She later began working thirty hours per week. The Plaintiff testified that she accepted the part-time employment offer because she was "extremely hesitant about going back to work at all" as a result of her experience at National Liberty.

In June 1996, the Plaintiff accepted a full-time position with a company called Counseling Center Incorporated, with whom she was working at the time of trial. She testified that in addition to working full-time at Counseling Center Incorporated she continued to work approximately six hours per week for her previous employer Rotary Lift/Parker Associates Incorporated.

In awarding the Plaintiff back pay loss in the amount of \$35,000 and compensatory damages in the amount of \$265,000, which included front pay loss and pain and suffering damages, it

appears that the jury determined that National Liberty failed to carry its burden of proving by a preponderance of the evidence that the Plaintiff failed to mitigate her damages. The court finds that the Plaintiff produced more than sufficient evidence from which a reasonable jury could reach its verdict awarding damages for back pay loss and front pay loss.

National Liberty further seeks in its post-trial motions a remittitur of the jury's damages award on the ground that the damages award is not supported by the evidence and is based on speculation. As the Third Circuit has pointed out: "The rationalization for, and use of, the remittitur is well established as a device employed when the trial judge finds that a decision of the jury is clearly unsupported and/or excessive . . . [and] [i]t's use clearly falls within the discretion of the trial judge" Spence v. Board of Education of Christina School District, 806 F.2d 1198, 1201 (3d Cir. 1986).

National Liberty's contention that the jury's damages award is not supported by the evidence and is based on speculation is without merit. At trial, the Plaintiff presented the expert testimony of an economist who opined that the Plaintiff's total back pay loss was in the amount of \$178,000 and that her total front pay loss through retirement would be in the amount of \$428,000.00. As heretofore pointed out, the Jury awarded the Plaintiff total damages in the amount of \$300,000., which is substantially less than the Plaintiff's back pay loss and front pay loss as projected by the Plaintiff's expert.

Finally, National Liberty contends that the court erred in charging the jury on front pay loss because reinstatement at National Liberty was available to the Plaintiff. National Liberty's contention is without merit. Prior to charging the Jury on the issues related to damages, the court made a finding outside the presence of the jury that based on the apparent animosity and distrust between the parties, reinstatement was not a feasible remedy in this case. The court acknowledged that although reinstatement is the "preferred remedy" in employment discrimination cases, it is well-settled that an award of front pay loss is the appropriate remedy where "the relationship between the parties [has] been so damaged by animosity that reinstatement is impracticable." Maxfield v. Sinclair International, 766 F.2d 788, 796 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986).

Conclusion

Accordingly, for the reasons heretofore set forth, the post-trial motions of Defendant National Liberty Corporation for judgment as a matter of law, or in the alternative for a new trial, or in the alternative for a remittitur of the damages award, will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDY HERKALO	:	
	:	
V.	:	94-CV-7660
	:	
NATIONAL LIBERTY CORP.	:	
and MICHAEL BOYLE	:	

ORDER

AND NOW, this 21st day of July, 1997, for the reasons stated
in this court's memorandum of July 21, 1997;

IT IS ORDERED: The post-trial motions of Defendant National
Liberty Corporation for judgment as a matter of law, or in the
alternative for a new trial, or in the alternative for a
remittitur of the damages award, are denied.

RAYMOND J. BRODERICK, J.